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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

TESTIMONY OF MARGARET BROWN
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COOK INLET REGION, INC.

BEFORE THE SUBCOMMITTEE ON MINORITY ENTERPRISE,
FINANCE AND URBAN DEVELOPMENT

May 20, 1994

Mr. Chairman and Members of the Subcommittee, thank you for
inviting our testimony today.

My name is Margaret Brown, and I am Senior Vice President of
Cook Inlet Region, Inc. ("CIRI"). I am a shareholder and I am of
Yupik Eskimo descent. I was born in Takotna, a tiny village in
the interior of Alaska near the Kuskokwim River. On behalf of
our 6,700 shareholders, I am honored to present to you our views
on the minority preference programs to be administered by the
Federal Communications Commission ("FCC" or "Commission") as it
awards telecommunications licenses through competitive bidding.

In my testimony today I will describe CIRI and its
shareholders, the promise of the telecommunications industry, and
why the minority preferences recently mandated by Congress are
vital to ensure that businesses owned by minorities and women

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have an opportunity to participate in the provision of spectrum-based services.

I. CIRI and its Shareholders

As you may be aware, CIRI is one of the thirteen regional Alaska Native corporations established by Congress under the terms of the Alaska Native Claims Settlement Act of 1971 ("ANCSA"). As Alaska entered the 1970s, Alaska Natives continued to suffer the grave social and economic hardships resulting from the disruption of their culture and lifestyle that began with the arrival of Russian fur traders 200 years earlier. At the same time, Alaska Natives demonstrated their legitimate claim to land in Alaska. Congress passed ANCSA to address these realities.

The terms of ANCSA represent a novel approach to U.S.-Native American relations. Rather than form a system of reservations, Congress directed that thirteen regional Alaska Native corporations be established, that Alaska Natives be enrolled to these corporations, and that the corporations issue to its members shares that could not be sold or otherwise pledged. Thus, Alaska Natives were propelled into the world of corporate shareholder status. They became the owners of corporations which, at the direction of Congress, hold the collective results

of their settlements with the federal government.¹ In turn, the corporations are assigned the challenge of earning profits for those shareholders and attending to the shareholders' real social and economic needs.

No one recognizes the complexity of that task more than the governing boards of directors and managers of these hybrid corporations. The simple act of bestowing shareholder status on Alaska Natives has not eliminated the host of socioeconomic disadvantages that are due in large measure to the effects of two centuries of past discrimination against Alaska Native people. According to a 1993 report by the United States Department of Commerce, only 58 percent of Alaska Native families consist of a husband and wife, compared with 80 percent of all families in Alaska. Indeed, the proportion of families with a female householder and no husband present was twice as high among Alaska Natives as among Alaska's total population. Bureau of the Census, United States Department of Commerce, We the First Americans 15-17 (1993) (the figures in the report are based on the 1990 Census of Population and Housing).

Moreover, only 4 percent of Alaska Natives receive Bachelor's degrees, compared with 23 percent statewide, and only

¹ Thus, while regional Alaska Native corporations might have significant aggregate capital resources, their resources actually are quite small when viewed per shareholder.

63 percent of Alaska Natives over the age of twenty-five have completed high school while the statewide total is 87 percent. Just 56 percent of Alaska Natives are in the State labor force and the median income in 1989 for Alaska Natives was 43 percent lower than the median income for the State as a whole. Twenty-three percent of all Alaska Natives live below the poverty line.²

Unfortunately, CIRI's Alaska Native shareholders can be described with these statistics. As part of its duty to serve its shareholders, CIRI — through a network of sister organizations — conducts a number of programs that provide scholarships and training, medical and dental services, and means to preserve Alaska Native culture and history.

While these initiatives are important, CIRI recognizes that generating profits for distribution to its shareholders is its paramount mission. To fulfill its mandate to provide for its Alaska Native shareholders, CIRI distributes one third of its net profits to shareholders for income maintenance. According to a recent survey of CIRI shareholders, 38 percent of CIRI shareholders have an annual family income that is less than \$15,000 per year. It is not surprising, then, that 71 percent of

² CIRI included the studies setting forth these and other statistics about Alaska Natives in a submission to the FCC in connection with the Commission's PCS Roundtable held in April. See FCC to Host Panel Discussions on PCS Issues April 11-12, Mimeo No. 42480 (rel. April 4, 1994).

shareholders spend their CIRI dividends on food, clothing, and shelter.

II. CIRI and Telecommunications

Cognizant of its special status, the nature of its shareholder base, and the broad mission bestowed by Congress, CIRI has moved to diversify its business interests. To minimize the risk to its shareholders, CIRI must preserve its precious capital resources by approaching business opportunities with a long-term view. CIRI cannot afford to enter "bet-the-company" deals. There is simply too much at stake.

To broaden the economic base from which it serves these shareholders, CIRI has begun to explore new frontiers in the telecommunications field. Having invested in several television and radio broadcasting facilities, CIRI appreciates the tremendous growth potential that telecommunications services provide. The potential for economic expansion in the non-broadcast telecommunications fields is especially great. CIRI sees the provision of these telecommunications services as a central facet of the company's strategy for growth.

However, finding a place on the national information superhighway can be very difficult — particularly for minority enterprises like CIRI. Telecommunications operations are highly

capital intensive, which makes competing for valuable federal licenses against entrenched telecommunications providers especially difficult. Those providers frequently have markedly greater resources than less established enterprises and they are able to link those resources with their industry expertise to dominate a particular market or service. That dominance is likely to continue with the advent of competitive bidding for telecommunications licenses. For this reason, it is critical that minority enterprises be given an opportunity to enter markets for emerging services at the ground level.

Congress recognized this reality in August when — as part of the Omnibus Budget Reconciliation Act of 1993 — it directed the FCC to consider a variety of measures to ensure that small businesses, rural telephone companies, and businesses owned by minorities and women (collectively "Designated Entities") are given the opportunity to participate in the provision of spectrum-based services when licenses are to be awarded through competitive bidding. Indeed, Congress dictated that these designated entities are to be given enhanced opportunities to offer spectrum-based services.³ CIRI applauds Congress' effort

³ New Section 309(j)(3)(B) of the Communications Act of 1934 directs the Commission to "promote . . . the following objectives [including] disseminating licenses among a wide variety of applicants including . . . businesses owned by members of minority groups and women." Similarly, Section 309(j)(4)(C) requires the Commission, in promulgating its regulations, to "prescribe area designations and bandwidth assignments that

to see that the emerging national information superhighway is open to all, and CIRI urges this Subcommittee to ensure that the congressional directive to afford designated entities the opportunity to participate in the provision of spectrum-based services is fulfilled.

III. The FCC Should Further Tailor Competitive Bidding Preferences by Limiting Them to Disadvantaged Entities

Consistent with its interest in seeing that designated entities are afforded the opportunity to participate in the provision of spectrum-based services, CIRI believes that the FCC should approach the issue of preferential measures with caution. At the threshold, the FCC's approach to designated entities set forth in the Commission's Second Report and Order⁴ is too broad. As CIRI noted in its Reply Comments to the FCC, the FCC should supplement its existing eligibility requirements by limiting

promote . . . economic opportunity for a wide variety of applicants, including . . . businesses owned by members of minority groups and women." Most significantly, Section 309(j)(4)(D) directs the Commission to "consider the use of tax certificates, bidding preferences, and other procedures" to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services" Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 312, 387 (1993) ("Budget Act").

⁴ Implementation of Section 309(j) of the Communications Act Competitive Bidding, Second Report and Order, FCC 94-61 (rel. April 20, 1994) ("Second Report and Order").

preferential measures to businesses owned by those who are disadvantaged.

When Congress declared that small businesses and businesses owned by minorities and women should be assured meaningful participation in spectrum-based services, its goal was to ensure the participation of groups that are disadvantaged by the presence of unique barriers to their participation in the telecommunications industry. Those barriers, often with roots in racial and gender discrimination, are based principally on a lack of access to financing and are manifested in the vast underrepresentation of those designated entities in the industry.

Indeed, these circumstances are detailed in the September, 1993 Report of the FCC Small Business Advisory Committee ("SBAC"),⁵ where the SBAC explains that each of the designated groups faces different but equally imposing barriers to entry into the telecommunications industry. See id. at 1-5. At bottom, then, it is the fact of disadvantage that unites these otherwise dissimilar groups, and it was the goal of Congress to see that disadvantaged entities find a place on the national information superhighway.

⁵ Report of the FCC Small Business Advisory Committee to the Federal Communications Commission Regarding GEN Docket 90-314 (Sept. 15, 1993) ("SBAC Report").

However, the approach detailed by the FCC in its Second Report and Order goes well beyond this intent. For example, the current approach would allow two of the largest media companies in the nation — with assets valued in billions of dollars — to be awarded special preferences at auction simply because they are owned and controlled by women.⁶ Do these companies require special assistance? Was that within the intent of Congress?

Whether a statute or administrative provision is overbroad is a complex question under prevailing constitutional jurisprudence and one that CIRI does not attempt to answer today. However, CIRI has one practical observation. In creating a preference program that applies roughly to 60 percent of the population, the FCC has failed to narrowly tailor the benefits of the program to avoid substantial and prolonged constitutional litigation. The intervening litigation will arrest the designated entity preference program and might well delay the introduction of competitive bidding generally. In that event, the benefits of an opportunity to participate in the provision of spectrum-based services will unnecessarily be delayed to people like CIRI's shareholders.

⁶ See Second Report and Order, at ¶ 277 (defining a woman-owned corporation as one in which a woman holds at least 50.1 percent equity and a 50.1 percent controlling interest).

In its Reply Comments to the Commission, CIRI proposed a solution that goes to the heart of congressional intent. The FCC should adopt preferences to benefit those groups that are disadvantaged with respect to opportunities to participate in the provision of spectrum-based services. Under this system a preference would not be given solely on the basis of race or gender, nor would it be given solely on the basis of size. Rather, a preference would be given to an entity that could demonstrate that it was disadvantaged. In that way, the grant of a preference would comport with the intent of Congress while limiting the availability of Commission assistance to those entities that truly need an enhanced opportunity to participate in the provision of spectrum-based services.

Specifically, CIRI has urged the FCC to employ the standards already established by the SBA for determining whether a business is "disadvantaged" for the purposes of admission to the SBA Minority Small Business and Capital Ownership Development Program, otherwise known as the "8(a)" program. These existing disadvantage standards would be particularly useful to the Commission in establishing a preference system geared to the disadvantaged nature of the particular business entity, not simply to the size of the entity. The standards are set forth at 13 C.F.R. §§ 124.105 & 124.106 (1993). I have included with this

testimony as Appendix A the text of the SBA standards tailored for use by the FCC in competitive bidding.⁷

IV. Designated Entities that Pass the "Disadvantaged" Test Must Be Eligible for All of the Preferences Enumerated by Congress

The preferences mandated by Congress are vital to ensure that businesses owned by disadvantaged minorities and women have an opportunity to participate in the provision of spectrum-based services. As I have noted above, telecommunications operations are highly capital intensive, which makes competing for valuable federal licenses against entrenched telecommunications providers especially difficult. Those providers are able to link their extensive resources with industry expertise to dominate a particular market or service. For this reason, it is crucial that each of the preferences enumerated by Congress is available for Congress' intended beneficiaries.

Congress directed the FCC to consider bidding credits and tax certificates to assist designated entities in winning licenses at auction and acquiring licenses on the open market, and alternative payment schedules — including installment payments — to assist designated entities in paying for licenses won at auction. Each of these preferences is designed to avoid

⁷ Appendix A includes (1) the regulations proposed by CIRI for use by the FCC, and (2) a marked-up version showing how those proposed regulations differ from the current SBA regulations.

an excessive concentration of licenses in the hands of existing telecommunications providers by enhancing the ability of designated entities to compete at different stages of the licensing process. The FCC should not curtail that advantage by limiting the scope of the preferences that it adopts.

For example, the FCC recently adopted designated entity preference rules to be applied in competitive bidding for narrowband personal communications services. Implementation of Section 309(j) of the Communications Act Competitive Bidding, Third Report and Order, FCC 94-98 (rel. May 10, 1994) ("Third Report and Order"). Notwithstanding the plain intent of Congress to afford preferences to each of the entities designated in the Budget Act, the Commission limited the availability of installment payment plans to small businesses bidding for small spectrum blocks. Id. at ¶¶ 86-87.

This limitation means that minority-owned businesses that lack access to capital but that cannot fit within the FCC's definition of small business will be denied access to government financing.⁸ Moreover, small businesses will be offered an

⁸ For example, Congress has expressly found that Indians such as CIRI's shareholders lack access to capital and to traditional sources of financing. See H.R. Rep. No. 907, 93d Cong., 2nd Sess., at 2 (1974), reprinted in 1974 U.S.C.C.A.N. 2873, 2874. Nevertheless, CIRI cannot fit within the FCC's definition of small business and, therefore, cannot receive government financing.

installment payment option only when they bid on limited spectrum blocks. Given the capital-intensive nature of the telecommunications industry, this cannot have been within the intent of Congress.

Congress directed the Commission to ensure that designated entities are given the opportunity to participate in the provision of spectrum-based services by way of the preferential measures set forth in the Budget Act. A minority-owned business too large to qualify as small under the definition adopted in the Second Report and Order might well still be denied a meaningful opportunity to participate in the provision of spectrum-based services. Given the capital-intensive nature of the services subject to auction — such as personal communications services — a company with a net worth in excess of \$6 million and average net income in excess of \$2 million can very easily be foreclosed from bidding on all but the smallest spectrum blocks in the most limited markets.⁹ Indeed, the Commission acknowledges that even the Chief Counsel for the SBA views the \$6 million/\$2 million size standard as infeasible for the services at issue. Second Report and Order, at ¶ 268.

definition of small business and, therefore, cannot receive government financing.

⁹ This is particularly the case if the installment payment option is restricted to the smallest service areas.

Thus, the Commission must broaden the availability of installment payments to include all entities that are eligible for Commission preferences. Moreover, each of the preferences enumerated by Congress must be available to all eligible entities to ensure that they have the opportunity to participate meaningfully in the provision of spectrum-based services.

V. The Commission Must Establish Stringent Antisham Requirements

In the Second Report and Order the Commission adopted a limited designated entity certification requirement to be included in a prospective bidder's short-form application. Second Report and Order, at ¶ 166. That provision would require the bidder simply to affirm that it is qualified as a designated entity under the Commission's eligibility rules. As CIRI discussed in its initial Comments to the FCC, however, a much more stringent antisham requirement is needed.

The FCC has recognized that "the search for control necessarily calls for an investigation beyond stock ownership in order to determine effectively where actual control resides."¹⁰ An analysis of de facto control involves analysis of a number of issues including: who has the power to direct the company's operations; who determines the make-up of the board of directors;

¹⁰ Stereo Broadcasters, Inc., 55 FCC 2d 819, 821-22 (1975).

whether a large minority shareholder also holds an influential executive post — in sum, who has the right to determine the company's basic policies.¹¹

Accordingly, CIRI noted that the key to fulfilling the purpose behind the award of preferences and to deterring sham applicants is to require that minorities have actual control of the entity that is to receive a preference and that minorities hold a significant equity interest in that entity. While the Commission adopted a minority eligibility standard that reflects this principle, the Commission's short-form affirmation does not require documentation in support of an applicant's claim of preference eligibility, nor does it communicate to the applicant the gravity of the declaration being made.

In light of the complexity involved with adopting de facto control as an element of any qualification standard, CIRI has urged the Commission to require that the following elements be demonstrated and certified in a winning bidder's long-form application to qualify the bidder for the license won at auction:

¹¹ See William S. Paley, 1 FCC Rcd 1025, 1026 (1986); Metromedia, Inc., 98 FCC 2d 300, 306 (1984), recon. denied, 56 R.R.2d 1198 (1985), appeal dismissed, California Ass'n of the Physically Handicapped v. FCC, 778 F.2d 823 (D.C. Cir. 1985); Southwest Texas Public Broadcasting Council, 85 FCC 2d 713, 715 (1981).

A. Minorities must have clear structural control over the applicant:

- in a limited partnership application, the minority must have general partner status and there must be substantial restraints on management control by any other general partner — partnership and management agreements must be filed with the application
- in a corporate application, minorities must at least possess 50.1 percent of the voting stock — shareholder records and voting trusts or agreements must be filed with the application
- in a consortium application, consortium agreements must be filed with the application.

B. Certain elements in an organizational structure which call into question the minority principal's involvement in the entity will disqualify the entity. For example, if non-minorities have the ability to "call" the minimum minority equity stake within a certain period (e.g., three years) or for a fixed or below market price, the applicant should not be considered eligible for minority preferences.

C. The Commission should make clear that if the applicant's statements are found to be false, the applicant (and its principals) will be subject to substantial penalties — both civil and criminal — as well as being disqualified from applying for any Commission license in the future. A warning such as the following (which is similar to that included in all FCC applications) should have a place of prominence in the "minority eligibility" certification block:

WILLFUL FALSE STATEMENTS OR OMISSIONS MADE IN THIS APPLICATION, INCLUDING CERTIFICATION WITH RESPECT TO THE APPLICANT'S ELIGIBILITY AS A MINORITY-CONTROLLED ENTITY, ARE PUNISHABLE BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18 SECTION 1001), CIVIL PENALTIES (U.S. CODE TITLE 47, SECTION 503), REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT (U.S. CODE, TITLE 47, SECTION 312(A)(1)); AND/OR DISQUALIFICATION FROM HOLDING ANY OTHER LICENSES ISSUED BY THE FEDERAL COMMUNICATIONS COMMISSION.

- D. Any attorney admitted to practice before the Commission under section 1.23 of the Commission's Rules shall be held to the standards of ethical conduct required of practitioners at the bar of any court of which he or she is a member. In principal, this means that an attorney who signs an application by a prospective minority-controlled entity certifies by his or her signature that he or she has read the application and that, to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, the statements made in the application are well grounded in fact. Under sections 1.24 and 1.52 of its Rules, the Commission should censure, suspend, or disbar any attorney who fails to conform to this standard.

These requirements would be relatively simple to administer and would ensure that the preferences adopted to increase minority participation in telecommunications would in fact serve that purpose instead of inuring to the benefit of non-minority enterprises which purport to be eligible for minority preferences, but, in fact, are shams.

VI. Conclusion

Mr. Chairman, the number of bills currently before Congress that will impact the telecommunications industry speaks to the vitality and the promise of this field. Nevertheless, minorities are grossly underrepresented in the telecommunications industry ranks. Congress has considered the lack of opportunities for minority group members in the telecommunications field several times before, and in August the Members of Congress spoke with one voice on the need for greater opportunities in this booming industry. Congress directed the FCC to ensure that all businesses owned by minorities and women are able to share in the

benefits of a valuable national resource, the electromagnetic spectrum. Cook Inlet urges this Subcommittee to see that the congressional directive is fulfilled.

Thank you very much.

APPENDIX A

PROPOSED FCC REGULATIONS

§ 1 Social Disadvantage

(a) *General.* Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identities as members of groups without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control. For social disadvantage relating to Indian tribes and Alaska Native Corporations, see § 3(a).

(b) *Members of designated groups.* (1) In the absence of evidence to the contrary, the following individuals are presumed to be socially disadvantaged: African Americans; Hispanic Americans; American Indians/Alaska Natives; Asian Americans/Pacific Islanders [See *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC Rcd 979 (1978).]

(2) An individual seeking socially disadvantaged status as a member of a designated group may be required to demonstrate that he/she holds himself/herself out and is identified as a member of a designated group if the FCC has reason to question such individual's status as a group member.

(c) *Individuals not members of designated groups.* An individual who is not a member of one of the above-named groups must establish his/her individual social disadvantage on the basis of clear and convincing evidence. A clear and convincing case of social disadvantage must include the following elements:

(1) The individual's social disadvantage must stem from his or her color, ethnic origin, gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society, or other similar cause not common to small business persons who are not socially disadvantaged.

(2) The individual must demonstrate that he or she has personally suffered social disadvantage, not merely claim membership in a non-designated group which could be considered socially disadvantaged.

(3) The individual's social disadvantage must be rooted in treatment which he or she has experienced in American society, not in other countries.

(4) The individual's social disadvantage must be chronic and substantial, not fleeting or insignificant.

(5) The individual's social disadvantage must have negatively impacted on his or her entry into and/or advancement in the business world. The FCC will entertain any relevant evidence in assessing this element of an applicant's case. The FCC will particularly consider and place emphasis on the following experiences of the individual, where relevant:

(i) **Education.** The FCC shall consider, as evidence of an individual's social disadvantage, denial of equal access to institutions of higher education; exclusion from social and professional association with students and teachers; denial of educational honors; social patterns or pressures which have discouraged the individual from pursuing a professional or business education; and other similar factors.

(ii) **Employment.** The FCC shall consider, as evidence of an individual's social disadvantage, discrimination in hiring; discrimination in promotions and other aspects of professional advancement; discrimination in pay and fringe benefits; discrimination in other terms and conditions of employment; retaliatory behavior by an employer; social patterns or pressures which have channelled the individual into nonprofessional or non-business fields; and other similar factors.

(iii) **Business history.** The FCC shall consider, as evidence of an individual's social disadvantage, unequal access to credit or capital; acquisition of credit or capital; acquisition of credit or capital under unfavorable circumstances; discrimination in receipt (award and/or bid) of government contracts; discrimination by potential clients; exclusion from business or professional organizations; and other similar factors which have impeded the individual's business development.

§ 2 Economic disadvantage.

(a) **Economically disadvantaged Individuals.** (1) Economically disadvantaged individuals are socially disadvantaged individuals or women whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged, and such diminished opportunities have precluded or are likely to preclude such individuals from successfully competing in the open market. In determining economic disadvantage the FCC may compare the applicant concern's business and financial profile with profiles of businesses in the same or similar line of business which are not owned and controlled by socially and economically disadvantaged individuals.

(2) This program is not intended to assist concerns owned and controlled by socially disadvantaged individuals or women who have accumulated substantial wealth, who have unlimited growth potential or who have not experienced or having overcome impediments to obtaining access to financing, markets and resources.

(3) For economic disadvantage as it relates to tribally-owned concerns, see § 3(a)(2).

(b) **Factors to be considered.** In determining the degree of diminished credit and capital opportunities of a socially disadvantaged individual or woman, the FCC will consider factors relating both to the applicant concern and to the individual(s) claiming disadvantaged status, including that individual's access to credit and capital; the

financial condition of the applicant concern; and the applicant concern's access to credit, capital and markets.

(1) *Personal financial condition of the individuals claiming disadvantaged status.* This criterion is designed to assess the relative degree of economic disadvantage of the individual as well as the individual's potential to capitalize or otherwise provide financial support for the business. The specific factors to be considered include but are not limited to: the individual's personal income for at least the past two years; total fair market value of all assets; and the individual's personal net worth. An individual whose personal net worth exceeds \$250,000 will not be considered economically disadvantaged.

(i)(A) Except as provided in paragraph (b)(1)(i)(B) of this section, when married, an individual upon whom eligibility is based shall submit a financial statement relating to his/her personal finances and a separate financial statement relating to his/her spouse's personal finances. A married applicant individual residing in any of the community property states or territories of the United States must clearly identify on his or her financial statement those assets which are his or her separate property and those which are community property. The spouse of such married applicant must similarly identify on his or her financial statement those assets which are his or her separate property and those which are community property. A one-half interest in the assets identified as community property (and income derived from such assets) will be attributed to the applicant individual for purposes of determining economic disadvantage. Assets or a community property interest in assets, which applicant spouse has transferred to a non-applicant spouse within 2 years of the date of the FCC application will be presumed to be the property of the applicant spouse for purposes of determining his/her personal net worth. However, such presumption shall not apply to any applicant spouse who is subject to a legal separation recognized by a court of competent jurisdiction. A financial statement of a spouse of an applicant is not required if the individual and his/her spouse are subject to a legal separation recognized by a court of competent jurisdiction. However, an applicant individual must include on his or her statement all community property in which he or she has an interest.

(B) Except for concerns where both spouses are individuals upon whom eligibility is based, the requirement of paragraph (b)(1)(i)(A) of this section, relating to the separate financial statements, applies only to determinations of economic disadvantage. For a concern where both spouses are individuals upon whom eligibility is based, the personal net worth of each spouse individually will be considered.

(2) *Business financial condition.* This criterion will be used to provide a financial picture of a firm at a specific point in time in comparison to other concerns in the same or similar line of business which are not owned and controlled by socially and economically disadvantaged individuals. In evaluating a concern's financial condition, the FCC's consideration will include, but not be limited to, the following factors: business assets, revenues, pre-tax profit, working capital and net worth of the concern, including the value of the investments in the concern held by the individual claiming disadvantaged status.

(3) *Access to credit and capital.* This criterion will be used to evaluate the ability of the applicant concern to obtain the external support necessary to operate a competitive business enterprise. In making the evaluation, the FCC shall consider the concern's access to credit and capital, including, but not limited to, the following factors: Access to long-term financing; equipment trade credit; access to raw materials and/or supplier trade credit; and bonding capability.

§ 3 Concerns owned by Indian tribes, including Alaska Native Corporations.

(a) *General.* Indian tribes are considered socially and economically disadvantaged for purposes of participation according to the following criteria:

(1) *Social disadvantage.* An Indian tribe meeting the definition set forth in § 4 shall be deemed socially disadvantaged.

(2) *Economic disadvantage.* With the exception of Alaska Native Corporations (see § 3(e)(2)), the Indian tribe must demonstrate to the FCC that the tribe itself is economically disadvantaged. This shall involve the consideration of available data showing the tribe's economic condition, including but not limited to, the following information:

- (i) The number of tribal members.
- (ii) The present tribal unemployment rate.
- (iii) The per capita income of tribal members, excluding judgment awards.
- (iv) The percentage of the local Indian population below the poverty level.
- (v) The tribe's access to capital markets.
- (vi) The tribal assets as disclosed in a current tribal financial statement. The statement should list all assets including those which are encumbered or held in trust, but the status of those encumbered or trust assets should be clearly delineated.
- (vii) A list of all wholly or partially owned tribal enterprises or affiliates and the primary industry classification of each. The list must also specify the members of the tribe who manage or control such enterprises or serve as officers or directors.

(3) *Application process -- forms and documents required.* In order to establish tribal eligibility, the Indian tribe must submit the forms and documents required of applicants generally as well as the following material.

- (i) A copy of the tribe's governing document(s) such as its constitution or business charter.

(ii) Evidence of its recognition as a tribe eligible for the special programs and services provided by the United States or by its state of residence.

(iii) Copies of its articles of incorporation and bylaws as filed with the organizing or chartering authority, or similar documents needed to establish and govern a non-corporate legal entity.

(iv) Documents or materials needed to show the tribe's economically disadvantaged status as described in paragraph (a)(2) of this section.

(b) *Legal business entity organized for profit and susceptible to suit.* The applicant or participating concern must be a separate and distinct legal entity organized or chartered by the tribe, or Federal or state authorities. The concern's articles of incorporation must contain express sovereign immunity waiver language, or a "sue and be sued" clause which designates United States Federal Courts to be among the courts of competent jurisdiction for all matters relating to the FCC's programs, including, but not limited to, loans, advance payments and contract performance. Also, the concern must be organized for profit, and the tribe must possess economic development powers in the tribe's governing documents.

(c) *Ownership.* For corporate entities, a tribe must own at least 51 percent of the voting stock and at least 51 percent of the aggregate of all classes of stock. For non-corporate entities, a tribe must own at least a 51 percent interest.

(d) *Control and management.* (i) Except for concerns owned by ANCs, the management and daily business operations of a tribally-owned concern must be controlled by an individual member(s) of an economically disadvantaged tribe. This paragraph does not preclude management of a tribally-owned concern by committees, teams, or Boards controlled by such individuals.

(e) *Individual eligibility limitation - (1) Concerns owned by Indian tribes except those owned by Alaska Native Corporations.* Requirements regarding management and daily business operations are met if a tribally-owned concern is controlled by one or more members of the economically disadvantaged Indian tribe.

(2) *Concerns owned by Alaska Native Corporations.* The Alaska Native Claims Settlement Act, as amended, provides that a concern which is majority owned by an Alaska Native Corporation shall be deemed to be controlled and managed by minority individuals and, pursuant to Pub. L. 102-415 § 10 (1992) (43 U.S.C. § 1626(e)), shall be deemed economically disadvantaged for purpose of participation in Federal programs. Therefore, the FCC will not examine the disadvantaged status of an individual involved in the management of daily business operations of an Alaska Native Corporation-owned concern.

§ 4 Definitions.

Alaska Native means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlaktla Indian Community), Eskimo, or Aleut blood, or a combination thereof. The term includes, in the absence of proof of a minimum blood quantum, any citizen who is regarded as an Alaska Native.

Alaska Native Corporation means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, et seq).

Indian tribe means any Indian tribe, band, nation, or other organized group or community of Indians, including any Alaska Native Corporation, as defined in this section, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which such tribe, band, nation, group, or community resides. See, definition of "tribally-owned concern."